



BRIEFING: MARCH 2012 BOARD MEETING AGENDA ITEM #3

TO: **Chairman Richard and Board Members**

FROM: **Thomas Fellenz, Chief Counsel**

DATE: **March 1, 2012**

RE: **Terms and Conditions, Stipend and RFP Scoring criteria applicable to the Design Build [DB] construction for the Central Valley Initial Construction Section**

Background/Discussion:

The initial operating segment (IOS) of the California High Speed Train System will run through the Central Valley and includes the initial construction section (ICS) from Fresno to Bakersfield. Construction of the ICS will involve four design build contracts for the final design and construction of all High Speed Rail (HSR) trackway civil infrastructure up to the top of the ballast. A fifth ICS design build contract will be entered into for the trackwork along the entire length of the ICS.

The Authority has started a two-phase best value procurement process for the first of the five ICS design build contracts, designated Construction Package #1. The first Request for Qualifications (RFQ) phase is complete, resulting in the shortlisting of five qualified design build teams which are now invited to participate in the second Request for Proposal (RFP) phase. The proposals submitted by the teams in response to the RFP will be evaluated and scored resulting in a recommendation to the Board to enter into a \$1.5 to \$2.0 billion design build contract with the selected team, expected to take place in early 2013.

To aid the HSR Authority in the final development of the Request for Proposals documents, a term sheet containing a summary of the major material terms and conditions for the Construction Package #1 design build contract was developed and is presented to the Board for approval.

To partially compensate for the cost of the preparation of the Proposals submitted, the HSR Authority can pay a stipend to those proposer teams not awarded the contract. HSR staff recommends a stipend be paid for each acceptable proposal submitted to the Authority by any shortlisted Offeror that is not awarded the contract or in case of termination of the RFP, proven costs not to exceed \$2 million.

In the evaluation of the proposals it is in the best interests of the HSR Authority to assure technically competent proposals and assure the best value is received. HSR staff is recommending a two-step RFP evaluation process that includes a technical evaluation resulting in the qualification of three of the five proposer teams followed by a combined technical/price evaluation of these top three proposer teams.

Recommendations:

Approve the term sheet, the RFP scoring criteria, and the stipend for Construction Package #1 per the terms in the attached Board resolution.

Attachments:

Construction Package #1 Term Sheet

Resolution # HSRA 12-04



RFP No. 11-016

**Construction Package #1
Initial Construction Section
of the
California High-Speed Train System**

Design-Build Contract Term Sheet

This document provides background information and summarizes certain terms anticipated to be in the Contract Documents for Construction Package #1 of the Initial Construction Section of the California High-Speed Train System. This document is not a restatement or interpretation of the contract requirements. There are numerous details, exceptions and qualifications associated with the provisions of the Contract Documents that can only be ascertained by reviewing the Contract Documents.

This document is subject to revision as Authority considers how best to allocate risk and responsibilities for the Project.

1. Contract Overview	
Project	Construction Package #1 of the Initial Construction Section of the California High-Speed Train System. The Project consists of Construction Package #1A (including Construction Package #1A Option 1) and options for Construction Packages #1B and #1C. Refer to the "Scope Options" provision under Section 4 (Payment) and the "Notice to Proceed" provision under Section 5 (Commencement of Work; Completion Deadlines) below.
Authority	California High-Speed Rail Authority
Contractor	Contractor will be determined through the procurement.
Contractor-Related Entity	<ol style="list-style-type: none"> 1. Contractor; 2. If Contractor is a joint venture, partnership or limited liability company, any joint venture member, partner or member of the Contractor; 3. Any Subcontractors; 4. Their employees, agents and officers; and 5. All other Persons for whom Contractor may be legally or contractually responsible.
Contract Documents/ Order of Precedence	<p>The Contract Documents consist of the following documents, in the following descending order of precedence:</p> <ol style="list-style-type: none"> 1. Design-Build Contract (signature document) 2. Special Provisions (Book 2, Part A) 3. General Provisions (Book 2, Part B) 4. Scope of Work (Book 2, Part C) 5. Final Environmental Documents and Mitigation Monitoring Plan 6. Third Party Agreements and Permits 7. Approved Design Variances 8. HSR Design Criteria Manual 9. HSR Directive Drawings 10. HSR CADD Manual 11. HSR Plans Preparation Manual 12. Proposal (provided that if Authority determines that the Proposal contains a provision that is more restrictive/beneficial to Authority than is specified elsewhere in the Contract Documents, that Proposal provision shall take precedence) <p>ATCs, amendments and Change Orders will have the priority just above the document that is being amended.</p>
Federal Requirements	The Contract will comply with High-Speed Intercity Passenger Rail (HSIPR) Program requirements (including the American Recovery and Reinvestment Act of 2009 (ARRA) requirements).
DBE/SBE Requirements	The Contract will address DBE/SBE requirements. . Contractor shall comply with the Authority SBE Policy and Plan goal of 30% small business participation. Contractor shall also comply with 41 C.F.R Part 60, 49 C.F.R. Part 26, Executive Order 11246 and Title VI of the Civil Rights Act of 1964.

2. Work	
General Responsibility	Contractor will be solely responsible for all materials, services and efforts necessary to achieve Final Acceptance on or before the Final Acceptance Deadline, and such materials, services and efforts are included in the Contract Price, except as otherwise specifically provided in the Contract Documents.
Design Liability	<p>Construction Packages #1A (not including Construction Package #1A Option 1) and #1B will include Preliminary Design to approximately 30% and Construction Packages #1A Option 1 and #1C will include Preliminary Design to approximately 15%.</p> <p>Contractor assumes full responsibility and liability with respect to design of the Project, including identifying and correcting any errors, omissions, inconsistencies or other defects in the Preliminary Design, if Contractor chooses to follow the Preliminary Design.</p>
Standards	<p>Contractor will design and construct the Project in conformity with the HSR Design Criteria Manual (subject to any variances requested by Contractor and approved by Authority during the procurement).</p> <p>The design will conform to all professional engineering principles generally accepted as standards of the industry in the State, will be suitable for its intended purpose and will be free of defects.</p> <p>Construction will be performed in a workmanlike manner and will conform to the standards of care and diligence normally practiced by recognized construction firms performing construction of a similar nature in the State.</p>
Permits and Approvals	<p>Authority has obtained or will obtain the following permits and governmental approvals (Authority-Provided Approvals):</p> <ol style="list-style-type: none"> 1. Merced to Fresno EIR/EIS 2. Fresno to Bakersfield EIR/EIS <p>Contractor will be responsible for obtaining all other permits and governmental approvals, including final versions of any draft approvals obtained by Authority.</p> <p>Contractor will comply with all conditions imposed by and undertake all actions required by and all actions necessary to maintain in full force and effect all permits and governmental approvals, except to the extent that such responsibility is expressly assigned in the Contract to another Person.</p>
Right of Way (ROW)	<p>Authority will obtain the ROW identified in the ROW acquisition plan incorporated in the Contract by the deadlines provided in the ROW acquisition plan. Contractor must agree to the ROW acquisition plan and must certify that the Contractor is able to construct the Project in accordance with the ROW acquisition plan. Contractor may be entitled to a Change Order for additional costs and a time extension, including overhead, profit and delay damages, due to failure of Authority to provide a parcel by the specified deadline. The Contractor will work proactively with the Authority's representative to resolve right-of-way acquisition plan changes and to adjust its construction schedule to accommodate these changes.</p> <ol style="list-style-type: none"> 1. Contractor may request additional ROW and temporary construction interests in its Proposal. To the extent Authority concurs, Authority will acquire such additional property. The additional property will be

	<p>factored in Authority's evaluation of the Proposal.</p> <ol style="list-style-type: none"> 2. Contractor may request additional ROW during the term of the Contract. If Authority determines that such additional ROW is necessary to build the Project, then Authority will acquire such additional property. 3. Contractor may request additional ROW as part of a Value Engineering Change Proposal (VECP), in which case the additional ROW costs will be addressed as part of the VECP. In this case, Contractor will be required to provide surveys, appraisals and other documentation to allow Authority to proceed with the acquisition. 4. If additional ROW is necessary as a result of an Authority-directed change, the additional ROW costs will be addressed in the Change Order for the Authority-directed change. <p>Contractor is responsible for acquiring, at its cost, any temporary construction interests not requested in its Proposal.</p> <p>Authority will require up to 24 months to acquire any ROW not identified on the ROW acquisition plan.</p>
Utilities	<p>Contractor is responsible for removing, relocating or otherwise adjusting all Utilities as needed for the Project, except where the applicable master agreement assigns such work to the Utility Owner. Contractor is also responsible for reimbursing relocation work by Utility Owners having "prior rights" (i.e., the legal right to reimbursement for relocation work) and collecting payments owing from Utility Owners. It is anticipated that master agreements will be in place with all impacted Utility Owners before the Proposal due date.</p> <p>Contractor's costs for certain relocations will be chargeable against the Utility/Third Party Provisional Sum (whether incurred for work performed by Contractor or for reimbursing a Utility Owner for its work). All other such costs are included in the Contract Price, except where the Utility Owner does not have prior rights (in which case Contractor will collect reimbursement directly from the Utility Owner). If Contractor's allowable costs exceed the Utility/Third Party Provisional Sum, Authority will reimburse Contractor for 50% of the excess. Authority will retain any positive balance remaining in the Utility/Third Party Provisional Sum after Project completion. The Utility/Third Party Provisional Sum is subject to increase as provided in the "Utilities" provision under Section 3 (Change Orders) below.</p> <p>A draft Task Order will be included in the RFP for each identified Relocation. Cost liability for each Relocation will be determined by Authority and the Utility Owner and indicated in the draft Task Orders. Contractor will also be able to rely on certain other information in the draft Task Orders.</p> <p>See the "Utilities" provision under Section 3 (Change Orders) below for information regarding Change Orders.</p>
Third Party Agreements	<p>Authority anticipates executing agreements with public agencies regarding non-utility facilities by June 2012. The Contract will address Contractor's obligations regarding those agreements. Generally, the Contractor will be responsible for fulfilling the Authorities obligations under the agreements with the Authority continued participation.</p>

Railroad Agreements	Authority anticipates executing agreements with railroads by June 2012. The Contract will address Contractor's obligations regarding those agreements. Generally, the Contractor will be responsible for fulfilling the Authorities obligations under the agreements with the Authority continued participation.
Hazardous Materials	<p>Contractor is responsible for remediating any hazardous materials discovered on the Site. See the "Hazardous Materials" provision under Section 3 (Change Orders) below for information regarding Change Orders.</p> <p>As between Contractor and Authority, Authority will be considered the generator and arranger for hazardous materials other than hazardous materials brought onto the Site by any Contractor-Related Entity or hazardous materials where the removal or handling involved negligence, willful misconduct or breach of contract by any Contractor-Related Entity. Whenever Authority has such arranger liability, Contractor's remediation plans will be subject to the prior written approval of Authority and Authority will have exclusive decision-making authority regarding selection of the destination facility to which such hazardous materials will be transported. Authority will comply with the applicable standards for generators and arrangers with regard to such hazardous materials, including the responsibility to sign manifests for the transport of hazardous wastes. Authority will indemnify, save, protect and defend Contractor from third party claims, causes of action and losses arising out of or related to generator or arranger liability for such hazardous materials.</p> <p>As between Contractor and Authority, Contractor will be considered the generator and arranger for hazardous materials brought onto the Site by any Contractor-Related Entity or hazardous materials where the removal or handling involved negligence, willful misconduct or breach of contract by any Contractor-Related Entity.</p>
Nonconforming Work	Authority may require nonconforming Work to be remedied, removed or replaced. Contractor is responsible for taking all necessary actions to close out any non-conformances to the satisfaction of Authority. Authority may, but is not obligated to, accept nonconforming Work without requiring it to be fully corrected, in which case the Contract Price will be decreased accordingly.
Verification and validation	Contractor is required to implement a verification and validation management plan following the principals of EN50126. As part of self-certification the Contractor shall engage a qualified Independent Checking and Site Engineer to verify and validate each of the Contractor's submissions to the Authority. The ICSE will report to the Authority.
Quality	<p>Contractor is required to establish and implement an Authority-approved Quality Management Plan following the principals of ISO 9001, including quality assurance and quality control.</p> <p>Authority may:</p> <ol style="list-style-type: none"> 1. Audit Contractor, at any time, to verify and validate compliance with Contractor's Quality Management Plan; 2. Witness any quality control or quality assurance test, acceptance test or inspection; and 3. Conduct independent tests and/or assessments of any material or equipment to be incorporated in the Work.

3. Change Orders

Change Orders	<p>An Authority signed Change Order or directive order is required for any Contract Price increase or time extension.</p> <p>Authority may issue a unilateral directive order and Contractor will proceed immediately with the Work as directed in the order, pending the execution of a formal Change Order (or, if the order states that the Work is within the original scope of the Work, Contractor will proceed with the Work as directed but will have the right pursuant to the disputes provision to request that Authority issue a Change Order with respect to the order).</p> <p>Contractor may request a Change Order only for those events and situations that the Contract Documents expressly contemplate that a Change Order is permitted.</p> <p>Contractor is required to provide prompt notice of the event or situation followed by a Change Order proposal including the anticipated price impacts, time impacts, scope of work and any changes to the Contract Documents.</p> <p>Each Change Order proposal must contain a sworn certification by Contractor (and Subcontractor(s), for any Subcontractor involved in the Work or event contemplated by the Change Order) including that the Change Order is made in good faith and in accordance with the terms of the Contract, the amount of time and/or compensation requested accurately reflects the appropriate adjustments and includes all known and anticipated impacts that may be incurred as a result of the event giving rise to such proposed change. Each Change Order proposal involving Subcontractor Work must include a sworn certification including that Contractor has investigated the basis for the Subcontractor's claims and has determined that all such claims are justified as to entitlement and amount of money and/or time requested.</p> <p>Change Orders are subject to strict procedural requirements, including requirements regarding timely notice of the event or situation giving rise to a Change Order.</p>
Authority-Directed Changes	<p>Authority may at any time require Contractor to make changes to the Work or its schedule. Contractor may be entitled to a Change Order for additional costs and a time extension, including delay damages, overhead and profit, resulting from the changes.</p>
Differing Site Conditions	<p>Contractor may be entitled to a Change Order for additional costs and a time extension, excluding delay damages but including overhead and profit, due to Differing Site Conditions.</p> <p>Differing Site Conditions are defined as:</p> <ol style="list-style-type: none"> 1. Subsurface or latent physical conditions encountered at the exact boring locations included in the Contract that differ materially from those indicated for such locations in the Contract; or 2. Unknown physical conditions at the Site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the Contract. <p>Differing Site Conditions exclude:</p> <ol style="list-style-type: none"> 1. Conditions which Contractor had, or should have had, actual or constructive knowledge as of the Proposal due date.

	<ol style="list-style-type: none"> 2. Utility facilities, hazardous materials, non-contaminated water and any conditions which constitute or are caused by Force Majeure. 3. Conditions that could have been discovered by reasonable Site investigation or review of other available information prior to the Proposal due date. 4. Variations in soil moisture content or groundwater levels from that represented in reports, borings or tests included in the Contract.
Force Majeure	<p>Contractor may be entitled to a Change Order for additional costs directly attributable to changes in the Work and a time extension, including overhead and profit on any actual damages but excluding delay damages, due to Force Majeure.</p> <p>Force Majeure is defined as any of the following events, provided it is beyond the control and not due to an act or omission of Contractor or Authority and could not have been avoided by due diligence or use of reasonable efforts by Contractor:</p> <ol style="list-style-type: none"> 1. Earthquake exceeding 3.5 on the Richter scale; 2. Tidal wave; 3. Epidemic, blockade, rebellion, war, riot, act of terrorism or civil commotion; 4. Discovery at, near or on the Site of any archaeological, paleontological, cultural, biological or other protected resources, provided that the existence of such resources was not disclosed in the Contract; 5. Lawsuit seeking to restrain, enjoin, challenge or delay construction of the Project or the granting or renewal of any governmental approval of the Project; and 6. Strike, labor dispute, work slowdown, work stoppage, secondary boycott, walkout or other similar occurrence occurring within the vicinity of the Project where each participant in such occurrence is not a Contractor-Related Entity. <p>Force Majeure excludes:</p> <ol style="list-style-type: none"> a. Fire or other physical destruction or damage, including lightning, explosion, drought, rain, flood, earthquakes equal to or under 3.5 on the Richter scale, hurricane, storm or action of the elements or other acts of God; b. Except as provided in subparagraph 3 above, explosion or malicious or other acts intended to cause loss or damage or other similar occurrence; c. Strike, labor dispute, work slowdown, work stoppage, secondary boycott, walkout or other similar occurrence (unless all participants in such occurrence are not a Contractor-Related Entity); and d. All other matters not caused by or beyond the control of Authority or a Contractor-Related Entity and not listed in subparagraphs 1 through 6 above. <p>Refer to the Builder's Risk Policy described in the "Insurance" provision under Section 6 (Security, Indemnities, Insurance, Maintenance, Risk of Loss, Warranties) below.</p>

Permits and Approvals	<p>Contractor may be entitled to a Change Order for additional costs and a time extension, excluding delay damages but including overhead and profit, due to:</p> <ol style="list-style-type: none"> 1. Changes in the final Authority-Provided Approvals from the draft requirements included in the RFP. 2. Suspension, termination, interruption, nonrenewal, denial, or failure to obtain any Authority-Provided Approval (except for modifications to such approvals or any new such approvals required to allow Contractor's design concepts to be incorporated into the Project).
Change in Law	<p>Contractor may be entitled to a Change Order for additional costs and a time extension, excluding delay damages but including overhead and profit on actual damages, due to a change in one or more applicable laws or the adoption of a new law after the date 30 days prior to the Proposal due date, excluding the following:</p> <ol style="list-style-type: none"> 1. Changes in law proposed or otherwise reasonably foreseeable 30 days prior to the Proposal due date. 2. Changes in law relating to taxes. 3. Changes in law that do not require a material modification in the Work or do not require Contractor to obtain a new major environmental approval (unless the Project or Contractor is specifically targeted by the change in law).
Utilities	<p>Contractor may be entitled to a Change Order for additional costs resulting from certain inaccuracies in the RFP regarding existing utilities, provided that if Contractor fails to discover the inaccuracy during the first 180 days following NTP-1 (for the Base Work), NTP-SO1 (for Scope Option 1 Work) or NTP-SO2 (for Scope Option 2 Work), Contractor is entitled to receive only 50% of its increased costs. To the extent Contractor discovers inaccuracies within such 180-day period regarding utilities addressed by the Utility/Third Party Provisional Sum, the Utility/Third Party Provisional Sum will be increased by mutual agreement to reflect any resulting additional costs. (See the "Notice to Proceed" provision under Section 5 (Commencement of Work; Completion Deadlines) below.) Contractor is entitled to overhead and profit but is not entitled to delay damages and disruption damages other than damages for idle time of undepreciated or rented equipment.</p> <p>Contractor may be entitled to a time extension for delays resulting from:</p> <ol style="list-style-type: none"> 1. Inaccuracies regarding Utilities which entitle Contractor to additional compensation. 2. A Utility Owner's failure to complete any relocation task by the applicable deadline to the extent there is no executed task order, in which case the Contract will provide that the parties share the risk 50/50. To the extent there is an executed task order, Contractor will not be entitled to a time extension under the Contract (although Contractor may be entitled to relief under the executed task order). <p>There will be no change in compensation, nor any time extension, for any of the following:</p> <ol style="list-style-type: none"> a. Reallocation of responsibility for relocation work between Contractor and a Utility Owner. b. Any Betterments (provided that Contractor will be entitled to collect

	<p>compensation for any added Betterments directly from the Utility Owner).</p> <p>c. Contractor's increased relocation costs for performing work or reimbursing Utility Owners for their work resulting from a Contractor-initiated change in the Project design.</p>
Hazardous Materials	<p>Contractor may be entitled to a Change Order for its direct remediation costs, excluding overhead, delay damages and profit, and a time extension, in the event Contractor encounters any hazardous materials. To the extent the hazardous materials are within a category for which unit prices were provided in the Proposal, if any, compensation will be based on the unit prices.</p> <p>The following are excluded:</p> <ol style="list-style-type: none"> 1. Investigation or characterization of hazardous materials or preparation of a remediation plan. 2. Hazardous materials brought onto the Site by any Contractor-Related Entity or hazardous materials where the removal or handling involved negligence, willful misconduct or breach of contract by any Contractor-Related Entity. 3. Hazardous materials that could have been avoided by reasonable design modifications or construction techniques. 4. Hazardous materials on additional properties requested by Contractor. 5. Hazardous materials (including lead and asbestos) encountered during the demolition of buildings, fixtures or other improvements on the Site.
Profit and Overhead	Profit and overhead will be paid at 10% of the direct costs plus, if the Work is subcontracted, 5% of the direct costs, regardless of the number of lower-tier subcontractors involved in any and all changed Work. This amount will fully compensate Contractor (and all subcontractors) for administration, general superintendence, overhead, profit and all other expenses not otherwise directly recoverable with respect to a Change Order.
Limitation on Contract Price Increases	<p>Any increase in the Contract Price will exclude:</p> <ol style="list-style-type: none"> 1. Costs caused by breach of contract or fault or negligence, or act or failure to act of any Contractor-Related Entity. 2. Costs which could reasonably have been avoided by Contractor, including by resequencing, reallocating, or redeploying its forces to other portions of the Work or to other activities unrelated to the Work (including any additional costs reasonably incurred in connection with such reallocation or redeployment). 3. Costs for (a) any rejected Work that failed to meet the requirements of the Contract Documents and (b) any necessary remedial Work.
Limitation on Time Extensions	<p>Any extension of a Completion Deadline will exclude any delay to the extent that it:</p> <ol style="list-style-type: none"> 1. Did not impact the Critical Path affecting a Completion Deadline. 2. Was due to the fault or negligence, or act or failure to act of any Contractor-Related Entity. 3. Could reasonably have been avoided by Contractor, including by resequencing, reallocating or redeploying its forces to other portions of the Work (provided that if the request for extension involves an

	<p>Authority-caused delay, Authority shall have agreed, if requested to do so, to reimburse Contractor for its costs incurred, if any, in resequencing, reallocating, or redeploying its forces).</p> <p>4. Was concurrent with any other delay for which Contractor is not entitled to an extension.</p> <p>Contractor will be required to demonstrate to Authority's satisfaction that the change in the Work or other event or situation which is the subject of a Change Order seeking a change in a Completion Deadline has caused or will result in an identifiable and measurable delay of the Work which has impacted the Critical Path activity affecting a Completion Deadline.</p> <p>Before March 1, 2017, only those events and situations that the Contract Documents expressly contemplate that a time extension is permitted are eligible for extension of the Completion Deadlines. On or after March 1, 2017, only Authority-caused delays are eligible for extension of the Completion Deadlines.</p>
Delay Damages and Disruption Damages	<p>Contractor is entitled to reimbursement of delay damages only for those events and situations that the Contract Documents expressly contemplate that delay damages are permitted, generally consisting of those events and situations caused by Authority.</p> <p>Delay damages are limited to direct costs actually and reasonably incurred by Contractor directly attributable to the delay of the Completion Deadline. Home office overhead is excluded from delay damages and not compensable under the Contract. Before Contractor may obtain any increase in the Contract Price to compensate for any delay damages, Contractor must demonstrate to Authority's satisfaction that:</p> <ul style="list-style-type: none"> 1. The Project Schedule in fact sets forth a reasonable method for completion of the Work. 2. The change in the Work or other event or situation that is the subject of the requested Change Order has caused or will result in an identifiable and measurable delay of the Work and impact the Critical Path affecting the Completion Deadline. 3. The Delay Damage was not due to any breach of contract or fault or negligence, or act or failure to act of any Contractor-Related Entity, and could not reasonably have been avoided by Contractor, including by resequencing, reallocating or redeploying its forces to other portions of the Work or other activities unrelated to the Work (subject to reimbursement for additional costs reasonably incurred in connection with such reallocation or redeployment). 4. The delay for which compensation is sought is not concurrent with any other delay for which Contractor is not entitled to delay damages. 5. Contractor has suffered or will suffer actual costs due to such delay, each of which costs shall be documented in a manner satisfactory to Authority. <p>Disruption Damages, whether from a single event or continual, multiple or repetitive events, are not allowed or recoverable under the Contract (except as stated above for certain utility-related delays). Disruption Damages include costs of (i) rearranging Contractor's Work plan not associated with an extension of a Completion Deadline and (ii) loss of efficiency, momentum or productivity.</p>

	Contractor may also be entitled to compensation for idle time of certain equipment as described in the “Utilities” provision of this Section 3 (Change Orders) above.
Alternative Technical Concepts	Contractor will be solely responsible for obtaining third party approvals required to implement approved Alternative Technical Concepts. If Contractor fails to obtain such approval or if it fails in any other way to implement the approved Alternative Technical Concepts, Contractor will comply with the corresponding baseline requirements without any increase in the Contract Price or extension of Completion Deadlines.
Value Engineering	Contractor may submit, for approval by Authority, Value Engineering Change Proposals (VECPs) that would reduce the cost of the Project without impairing essential functions or characteristics of the Project as determined by Authority. VECPs cannot be based solely on a change in quantities. Authority and Contractor will share any cost savings on a 50/50 basis. Note: if additional ROW is required by a VECP, or ROW requirements are reduced, that will be factored into the savings sharing.

4. Payment

Contract Price	The lump sum firm fixed Contract Price will be determined through the procurement.
Provisional Sums	The Utility/Third Party Provisional Sum is the amount of \$ _____ [to be provided]. Refer to the “Utilities” provision under Section 2 (Work) above. The Community Betterments Provisional Sum is the amount of \$ _____ [to be provided]. Authority will have the option to use the Community Betterments Provisional Sum through Authority-directed changes.
Warranty Options	Refer to the “Warranties” provision under Section 6 (Security, Indemnities, Insurance, Maintenance, Risk of Loss, Warranties) below.
Scope Options	Authority may exercise two options to include the corresponding scope in the Project by issuing a notice to proceed for each option (see the “Notice to Proceed” provision under Section 5 (Commencement of Work; Completion Deadlines) below): <ol style="list-style-type: none"> 1. Scope Option 1: Construction Package #1B. 2. Scope Option 2: Construction Package #1C. The option prices will be determined through the procurement.
Retainage	Retainage will be withheld under the Contract at the rate of 5% of all invoices paid up to a cap of \$10,000,000.00.
Cash Flow Curve	The Cash Flow Curve established by the Proposal constitutes a cap on cumulative milestone payments. Payment of any amounts included in an invoice which exceed the maximum aggregate amount payable under the Cash Flow Curve will be deferred (without interest) until funds are available under the Cash Flow Curve. The Contract will provide a process for the Contractor to propose changes annually to the Cash Flow Curve for Authority approval.
Payment Milestones	Payment will be made monthly based on 100% completed milestones. Contractor shall determine and describe the payment milestones in its proposal.

5. Commencement of Work; Completion Deadlines

Notice to Proceed	<p>Contractor will not proceed with any Work under the Contract without a written notice to proceed for such Work from Authority. Any Work performed or expenses incurred by Contractor prior to Contractor's receipt of a written notice to proceed for such Work is Contractor's risk.</p> <ol style="list-style-type: none"> 1. NTP-1 authorizes Work on Construction Package #1A (including Construction Package #1A Option 1) (Base Work). 2. NTP-SO1 authorizes Work on Construction Package #1B (Scope Option 1 Work). 3. NTP-SO2 authorizes Work on Construction Package #1C (Scope Option 2 Work). <p>Authority may issue NTP-1 within 180 days after the Proposal due date without escalation and Authority may issue NTP-1 between 180 days and 360 days after the Proposal due date upon application of a prescribed escalation that will be set forth in the RFP (except to the extent that such failure is caused by Contractor). Either party may terminate the Contract if NTP-1 has not been issued within 360 days after the Proposal due date.</p> <p>The Contract will contain deadlines by which Authority must issue NTP-SO1 and NTP-SO2 if it desires to exercise those scope options for the prices set forth in the Proposal.</p>
Prerequisites for Start of Construction	<p>Contractor will not start construction of any portion of the Project until all the following prerequisites have been fully satisfied with respect to the Work proposed to be constructed:</p> <ol style="list-style-type: none"> 1. Authority has issued NTP-1 (for Base Work), NTP-SO1 (for Scope Option 1 Work) or NTP-SO2 (for Scope Option 2 Work). 2. All governmental approvals necessary for construction of such portion of the Project have been obtained and all conditions of such governmental approvals that are a prerequisite to commencement of such construction have been performed. 3. All insurance policies, OCIP enrollments and payment and performance bonds required to be delivered to Authority under the Contract have been submitted to Authority and remain in full force and effect. 4. All necessary rights of access for such portion of the Project have been obtained. 5. Released for construction documents have been issued for that portion of the Work. 6. Any additional conditions for construction set forth in the Contract have been fully satisfied.
Completion Deadlines	<p>Substantial Completion generally consists of completion of all physical Work other than punch list items and that the Project can be used without damage to the Project or any other property on or off the Site, and without injury to any Person. The Substantial Completion Deadline is 36 months after NTP-1.</p> <p>Final Acceptance consists of completion of all Work including all punch list items and documentation. The Final Acceptance Deadline is 38 months after NTP-1.</p>

Liquidated Damages	<p>Liquidated damages will be assessed if Contractor fails to achieve Final Acceptance by the Final Acceptance Deadline as follows:</p> <ol style="list-style-type: none"> 1. Before March 1, 2017: \$20,000/day 2. On or after March 1, 2017: \$1 million/day <p>Liquidated damages will be subject to a cap equal to 10% of the initial Contract Price.</p> <p>Assessment of liquidated damages for delay will not preclude Authority from exercising its other rights and remedies set forth in the Contract other than the right to collect damages associated with such delay.</p>
Float	Float belongs to the Contractor.
6. Security, Indemnities, Insurance, Maintenance, Risk of Loss, Warranties	
Surety Bonds	A payment bond in the amount of 100% of the sum of the Contract Price and all Provisional Sums and a performance bond in the amount of 50% of the sum of the Contract Price and all Provisional Sums are required upon execution of the Contract.
Guaranty	<p>If Contractor is a limited liability company, each limited liability company member will be required to provide a guaranty of Contractor's obligations. If Contractor or its members submitted parent company financial statements in response to the RFQ or RFP, each such parent company will be required to provide a guaranty of Contractor's obligations. Authority may also require an additional performance guaranty based on the financial information provided in response to the RFQ or RFP.</p> <p>The guaranty will require the guarantor to financially support, unconditionally, all obligations of Contractor under the Contract during the Contract term, including the warranty period(s).</p>
Indemnities	<p>Contractor will fully defend, indemnify and hold harmless Authority and all of its directors, officers, employees, and agents and their respective successors and assigns ("Indemnified Persons") from any and all claims, demands, causes of action, damages, losses, and expenses (including attorney's fees) of whatsoever nature, character, or description that any person or entity has or may have arising out of or related to:</p> <ol style="list-style-type: none"> 1. The breach of, alleged breach of, failure to perform or alleged failure to perform the Contract, including without limitation breach of warranty, by any Contractor-Related Entity; 2. The failure or alleged failure by any Contractor-Related Entity to comply with any applicable laws; 3. The negligent act, omission, misconduct, or fault, or the alleged negligent act, omission, misconduct, or fault of any Contractor-Related Entity; 4. Any service or design, or product called for in any service or design, provided by any Contractor-Related Entity that infringes or allegedly infringes any patent, copyright, trademark, service mark, trade dress, utility model, industrial design, mask work, trade secret or other proprietary right of a third party; 5. Any and all claims by any governmental or taxing authority claiming taxes based on gross receipts, purchases or sales, the use of any

	<p>property or income of any Contractor-Related Entity with respect to any payment for the Work made to or earned by such Contractor-Related Entity under the Contract Documents;</p> <ol style="list-style-type: none"> 6. Any and all stop notices and/or liens filed in connection with the Work, including all expenses and attorneys' fees incurred in discharging any stop notice or lien, provided that Authority is not in default in payments owing to Contractor with respect to such Work; 7. Any release or threatened release of hazardous materials (a) brought onto the Site by any Contractor-Related Entity or (b) where the removal or handling involved negligence, willful misconduct or breach of contract by any Contractor-Related Entity; or 8. The claim or assertion by any contractor of inconvenience, disruption, delay or loss caused by interference by any Contractor-Related Entity with or hindering the progress or completion of work being performed by other contractors or failure of any Contractor-Related Entity to cooperate reasonably with other contractors. <p>Contractor will fully defend, indemnify and hold harmless the Indemnified Persons from any and all claims, demands, causes of action, damages, losses, and expenses (including attorney's fees) of whatsoever nature, character, or description that any person or entity has or may have arising out of or related to errors, omissions, inconsistencies, inaccuracies, deficiencies or other defects in the design documents, regardless of whether such errors, omissions, inconsistencies, inaccuracies, deficiencies or other defects were also included in the Preliminary Design. Contractor will acknowledge that the Preliminary Design does not constitute "design furnished" by Authority for purposes of anti-indemnity laws.</p>
Insurance	<p>Authority will procure a project professional liability insurance policy in the amount of \$25,000,000 that covers the professional duties, services and activities required under the Contract. Participation in this program is mandatory for Contractors and Subcontractors at all tiers who are performing professional duties, services or activities, or who have a pollution legal liability exposure that is covered by this policy.</p> <p>Authority will provide an Owner Controlled Insurance Program (OCIP) for Work performed on the project site:</p> <ol style="list-style-type: none"> 1. General Liability Policy. Limits of \$2,000,000 per occurrence and \$4,000,000 annual aggregate. Contractor or Subcontractor of any tier making a claim under the General Liability Policy will be responsible for the deductible of \$10,000 per occurrence. 2. Workers' Compensation and Employer's Liability Insurance. Statutory limits on Workers' Compensation Insurance and Employer Liability Limits of: <ul style="list-style-type: none"> - \$1,000,000 Bodily Injury with Accident – Each Accident - \$1,000,000 Bodily Injury by Disease – Policy Limit - \$1,000,000 Bodily Injury by Disease – Each Employee <p>Authority will provide a Builder's Risk Policy with limits of the replacement cost. Contractor or Subcontractor at any tier making a claim under the Builders' Risk Policy will be responsible for the deductible of \$100,000 per occurrence per location (or pro rata share thereof).</p> <p>Authority reserves the right to terminate or modify any insurance provided</p>

	<p>upon providing 45 days advance written notice to Contractor and each Subcontractor. Upon any termination or modification, Contractor and each Subcontractor will be required to obtain replacement insurance coverage acceptable to Authority. In such event, Contractor will be entitled to a Change Order for the reasonable cost of the replacement insurance. Contractor is required to provide the following insurance:</p> <ol style="list-style-type: none"> 1. Automobile Liability Insurance. Limits of: <ul style="list-style-type: none"> - \$1,000,000 Bodily Injury – Per Person - \$2,000,000 Bodily Injury – Per Accident - \$1,000,000 Property Damage – Per Accident - \$2,000,000 Combined Single Limit 2. Workers' Compensation and Employer's Liability Insurance for non-OCIP workers. Statutory limits on Workers' Compensation Insurance and Employer Liability Limits of: <ul style="list-style-type: none"> - \$1,000,000 Bodily Injury with Accident – Each Accident - \$1,000,000 Bodily Injury by Disease – Policy Limit - \$1,000,000 Bodily Injury by Disease – Each Employee 3. Commercial General Liability Insurance for occurrences outside of OCIP. Combined Bodily Injury and Property Damage Limit of \$1,000,000 per occurrence, \$2,000,000 General Aggregate. 4. Excess/Umbrella Liability Insurance of not less than \$100,000,000 per occurrence in excess of the underlying coverage.
Maintenance / Risk of Loss During Construction	<p>Contractor is responsible for maintenance and risk of loss of the Project. Refer to the Builder's Risk Policy described in the "Insurance" provision above.</p>
Warranties	<p>Contractor warrants that:</p> <ol style="list-style-type: none"> 1. The Work conforms to the requirements of the Contract. 2. All design Work conforms to all professional engineering principles generally accepted as standards of the industry in the State, is suitable for its intended purpose and is free of errors, omissions, inconsistencies, inaccuracies, deficiencies or other defects. 3. The construction Work is performed in a workmanlike manner and conforms to the standards of care and diligence normally practiced by recognized construction firms performing construction of a similar nature in the State. 4. Materials and equipment furnished under the Contract, except Authority-furnished property, are of good quality and, except if otherwise set forth in the Contract, when installed, is new. 5. The Project is fit for the purposes intended. 6. The Project remains in the same condition as it is in at Final Acceptance excluding normal wear and tear and any damage caused by other contractors working at the Site. <p>The initial warranty period commences upon Substantial Completion and continues for a period of two years from Final Acceptance. Authority has five options to extend the warranty period by one year for each option. The warranty option prices will be determined through the</p>

	<p>procurement. Authority will exercise its warranty options, if at all, prior to the expiration of the initial two year warranty.</p> <p>The warranties on any repair or replacement will extend beyond the original warranty period if necessary to provide at least a one-year warranty period from the date of acceptance of the repairs or replacement.</p> <p>Upon Final Acceptance, the Contractor will have the right to replace the performance bond with a replacement bond in the amount of 10% of the sum of the Contract Price and all Provisional Sums in a form satisfactory to the Authority in its sole discretion guaranteeing due and punctual performance of Contractor's obligations under the Contract that survive Final Acceptance, or with such other security as is approved by Authority in its sole discretion.</p> <p>Contractor's and Subcontractors' warranties are assignable by Authority immediately upon providing written notice to Contractor.</p>
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7. Defaults, Remedies, Suspensions, Terminations

Contractor Defaults	<ol style="list-style-type: none"> 1. Contractor refuses or fails to commence the Work within the time required by the Contract. 2. Contractor refuses or fails to prosecute the Work or any separable part in accordance with the Contract Documents and with the diligence that will ensure its completion within the time specified in the Contract. 3. Contractor refuses or fails to provide sufficient resources to complete the Work in an acceptable manner and without delay or promptly pay its Subcontractors. 4. Contractor refuses or fails to complete the Work within the time specified in the Contract. 5. Contractor assigns or transfers the Contract Documents or any right or interest therein, except as expressly permitted in the Contract. 6. Contractor or any guarantor becomes insolvent, generally does not pay its debts as they become due, admits in writing its inability to pay its debts, or makes an assignment for the benefit of creditors. 7. Insolvency, receivership, reorganization or bankruptcy proceedings shall have been commenced by or against Contractor or any guarantor and not dismissed within 60 days. 8. Contractor fails to provide and maintain the performance and payment bonds, any guaranty and the insurance as required hereunder. 9. Any material representation or warranty made by Contractor or any guarantor in the Contract Documents or in any certificate, schedule, instrument or other document delivered pursuant to the Contract Documents is false or materially misleading when made. 10. Contractor violates any law in performance of the Work. 11. Any guarantor revokes or attempts to revoke its obligations under its guaranty, or otherwise takes the position that such instrument is no longer in full force and effect. 12. Contractor breaches any other agreement, representation or warranty contained in the Contract Documents, or Contractor fails to perform any other obligation under the Contract Documents.
Cure Periods	Contractor and its surety under the performance bond is entitled to the

	<p>following notice and cure periods:</p> <ol style="list-style-type: none"> 1. No notice or cure period with respect to a breach described under paragraphs 9, 10 and 11 of the “Contractor Defaults” provision above. 2. 30-day cure period with respect to a breach described under paragraphs 1 through 8 and 12 of the “Contractor Defaults” provision above. <p>If Contractor is unable to cure the applicable default within the time period specified, but in Authority's reasonable determination (i) Contractor has diligently and continuously undertaken efforts to cure such default and (ii) such failure to cure is beyond the control of Contractor, Authority may extend the cure period in accordance with its discretion up to 60 days.</p>
Authority Remedies	<p>Upon an event of default, Authority may terminate Contractor's right to proceed with the Work or Authority may take over the Work and complete it by contract or otherwise. The rights and remedies of Authority provided for under the Contract are in addition to any other rights and remedies provided by law.</p>
Consequential Damages	<p>Contractor and Authority will not be liable for punitive damages or special, indirect or incidental consequential damages, whether arising out of breach of the Contract, tort (including negligence) or any other theory of liability, and each party releases the other party from any such liability. The foregoing limitation on liability for consequential damages will not apply to or limit any right of recovery respecting the following:</p> <ol style="list-style-type: none"> 1. Losses (including defense costs) to the extent covered by (a) the proceeds of insurance required to be carried under the Contract or (b) the proceeds of insurance actually carried by or insuring Contractor under policies solely with respect to the Project and the Work; 2. Losses arising out of fraud, criminal conduct, intentional misconduct, recklessness, bad faith or gross negligence; 3. Contractor's or Authority's indemnities under the Contract; 4. Contractor's obligation to pay liquidated damages in accordance with the Contract; 5. Specific amounts owing under the express provisions of the Contract; and 6. Losses arising out of releases of hazardous materials by Contractor or Authority.
Suspension	<p>Authority may order Contractor to suspend all or any part of the Work for the period of time that Authority deems appropriate.</p> <ol style="list-style-type: none"> 1. Suspension for cause. No adjustment will be made for suspensions: <ul style="list-style-type: none"> - required to correct conditions unsafe for Project personnel or the general public; - required to comply with any governmental approval, law or otherwise carry out the requirements of the Contract; or - to the extent that performance would have been suspended or delayed by any other cause, including the fault or negligence of Contractor for which an equitable adjustment is provided for or excluded under any other provision of the Contract.

	<p>2. Suspension for convenience. Contractor is entitled to a Change Order for additional costs (including overhead and delay damages but excluding profit) and a time extension for suspensions beyond a 240-hour cumulative period.</p>
Termination for Convenience	<p>Authority may, whenever the interests of Authority so require, terminate the Contract, in whole or in part, for the convenience of Authority. Contractor and all Subcontractors will not be entitled to anticipatory or unearned profit or consequential or other damages as a result of a termination or partial termination for convenience.</p>

8. Other Contract Provisions

Dispute Resolution	<p>Any disputes will be required to go through a formal partnering process and be adjudicated by a dispute resolution board before a party can bring the dispute to binding arbitration. The standing dispute resolution board will consist of one member selected by Authority and approved by Contractor, one member selected by Contractor and approved by Authority, and a third member who will be the chairperson will be selected by the first two members subject to the approval of the parties. Decisions of the dispute resolution board will be binding up to \$1,000,000.00. Disputes not resolved through this process may be submitted to binding arbitration.</p>
Coordination	<p>Contractor will coordinate with Authority and other contractors performing work on or near the Site. Contractor will conduct its Work without interfering with the work being performed by other contractors.</p> <p>If Contractor asserts that any of Authority's other contractors have interfered with the Work, then Contractor's sole remedy will be to seek recourse against such other contractors.</p>
Escrowed Proposal Documents (EPDs)	<p>Contractor's detailed Proposal pricing information will be kept by Authority in a locked cabinet with Contractor controlling the key. The EPDs are available for joint review by Contractor, Authority and the DRB or other dispute resolvers in connection with approval of the schedule of values, negotiation of Change Orders, resolution of disputes and to determine whether the EPDs are complete.</p> <p>Concurrently with submission of quotations or revisions to quotations provided in connection with proposed amendments to the Contract and concurrently with approval of each Change Order, if appropriate, one copy of all documentary information used in preparation of the quotation or Change Order will be added to the cabinet to be held with the other EPDs. Contractor will require each Subcontractor whose Subcontract price equals or exceeds \$5,000,000 to submit to Contractor a copy of all documentary information used in determining its subcontract price, immediately prior to executing the subcontract or change orders or amendments thereto, to be held in the same manner as the EPDs and which shall be accessible by Contractor, Authority, the DRB and other dispute resolvers, on terms substantially similar to those that apply to Contractor.</p> <p>The EPDs will be maintained until: (a) expiration of Contractor's warranties or termination of the Work; (b) all disputes regarding the Contract have been settled; and (c) final payment on the Contract has been made by Authority and accepted by Contractor.</p>

Assignment	<p>Contractor may not assign the Contract, any part of the Contract or any monies due or to become due under the Contract without the prior written approval of Authority.</p> <p>Authority may assign without Contractor's consent all or any portion of the Contract, payment and performance bonds and guaranties to any entity that succeeds to the governmental powers and authority of Authority.</p>
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Resolution # HSRA 12-04

Approval of the Term Sheet, Stipend and RFP scoring criteria for Construction Package # 1

Whereas, the California High-Speed Rail Authority (Authority) may enter into design build contracts with private and public entities pursuant the Public Utilities Code §185036;

Whereas, the Authority is engaged in a procurement process leading to the award of a Design Build contract along the Initial Construction section in the Central Valley from north of the San Joaquin River and south to approximately East American Way through the City of Fresno (Construction Package #1).

Whereas, a Request for Qualifications was issued by the Authority and a shortlist of the most highly qualified Offerors has been established, who may submit proposals for the Construction Package #1.

Whereas, to aid the HSR Authority in the final development of the Request for Proposals (RFP) documents, a term sheet containing a summary of the major material terms and conditions for the Construction Package #1 contract was developed and presented to the Board for approval.

Whereas, the HSR Authority is requesting approval to pay a stipend in the amount up to \$2 million for each acceptable proposal submitted to the Authority by any shortlisted Offeror that is not awarded the contract or in case of termination of the RFP, proven costs not to exceed \$2 million.

Whereas, the HSR Authority is requesting approval of a two-step RFP evaluation criteria to include a technical evaluation resulting in the qualification of three of the five proposer teams followed by a combined technical/price evaluation of these top three proposer teams.

Therefore it is resolved,

The Executive Director/Chief Executive Officer or a designee of the Executive Director/Chief Executive Officer is hereby authorized and directed to proceed with the RFP using the term sheet presented for Construction Package #1, a Design Build Project along the Initial Construction section in the Central Valley which begins north of the San Joaquin River and continues south to approximately East American Way through the City of Fresno.

The Executive Director/Chief Executive Officer is hereby authorized and directed to make appropriate non-substantive changes to the Construction Package #1 RFP terms contained on the term sheet in consultation with the Board Chair as part of the RFP evaluation and contract negotiation process.

The Executive Director/Chief Executive Officer is hereby authorized to include a stipend in the amount of up to \$2 million per proposal as part of the procurement for Construction Package #1 subject to the appropriate conditions set forth in terms of the RFP and above.

The Executive Director/Chief Executive Officer is hereby authorized to use a two-step RFP evaluation process that includes a technical evaluation resulting in the qualification of three of the five proposer teams followed by a combined technical/price evaluation of these top three proposer teams.

Vote:

Date:

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